CHUA CHENG WAN

v.

CHUA THIAM SIEW & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: D3-22-143-96]
9 SEPTEMBER 1999

CIVIL PROCEDURE: *Action - Reinstatement - Application to reinstate writ of summons and statement of claim - Whether court has power or jurisdiction - Whether must proceed by way of appeal - Mistake of counsel - Whether an excuse - Merit of plaintiff's claim*

The court issued a show-cause notice to the plaintiff for failing to file a summons for directions, which he had been instructed to file. On the hearing of the show-cause notice, the judge struck out the writ and statement of claim for non-prosecution. The plaintiff then filed an application by way of summons-in-chambers to reinstate the writ and statement of claim.

Held:

[1] The High Court has no inherent power or jurisdiction to reinstate an action that has been struck off, except by way of an appeal.

[2] Even if the predicament of the plaintiff arose from a mistake of his counsel, it would not have been a reason for the exercise of the discretion to reinstate. A lawyer's mistake is not an excuse.

[3] The argument that the plaintiff's claim had merit would only be applicable in the context of an O. 18 r. 19 Rules of the High Court 1980 hearing.

[Plaintiff's application dismissed.]

Case(s) referred to:
Birkett v. James [1977] 3 WLR 38 ***(refd)***
Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff Tuan Mohamed [1974] 1 MLJ 58 ***(foll)***
Chong Kueng Ying & Ors v. Lovis Lavagna [1972] 1 MLJ 180 ***(foll)***
Esa Sa'yon v. Woon Kim Poh & Anor [1996] 2 CLJ 885 ***(dist)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 2 MLJ 129 ***(foll)***
In re Suffield and Watts, ex p Brown [1888] 20 QBD 693 ***(refd)***
In re Swire; Mellor v. Swire [1885] 30 Ch D 239 ***(refd)***
Ivanhoe Gold Corp Ltd v. Symonds [1906] 4 CLR 642 ***(refd)***
MacCarthy v. Agard [1933] 2 KB 417 ***(refd)***
Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia & Ors [1996] 2 CLJ 923 ***(refd)***

Preston Banking Co v. William Allsup & Sons [1895] 1 Ch 141 ***(refd)***
United Malayan Banking Corporation Bhd v. Palm & Vegetable Oil [1994] 3 CLJ 144 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 56 rr. 1, 2

For the plaintiff - R Menon (George Chong with him); M/s David Chong & Co
For the defendants - Zacchary Scully; M/s Chellam Wong

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Wahab Patail J:

By this summons in chambers dated 8 June 1999, the plaintiff applied to reinstate a writ of summons and statement of claim struck out on 27 March 1999.

The grounds advanced for the application are stated to be:

1. The plaintiff who is resident overseas has been found, contacted and his instructions and documents obtained to proceed with this action.

2. That the plaintiff and the first four defendants are brothers, and in 1998 a consent order was recorded between the plaintiff, a brother Chua Ching Siew and the first defendant in D2-22-142-96 and S2-22-434-92, and feared the consent order would be affected by this proceeding had it been pursued earlier.

3. The period of limitation has expired and the plaintiff would be prejudiced if the writ is not reinstated.

4. That the plaintiff's claim has merit.

The application is supported by the affidavit of Ronald Menon, an advocate and solicitor acting for the plaintiff and who asserts he has been authorised by the plaintiff to swear the affidavit. He is also the solicitor who appeared to submit upon the application.

The plaintiff had been instructed on 15 May 1998 by the Deputy Registrar to file summons for directions. On 27 March 1999 after issue of a show-cause notice, the judge struck out the writ of summons and statement of claim for non-prosecution. The relevant principles are clear. *Birkett v. James* [1977] 3 WLR 38; [1977] 2 All ER 801; [1978] AC 297 HL laid down the now famous principle that the court has the power to dismiss an action for want of prosecution, not only where the plaintiff's default has been intentional and

contumelious but also where there has been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the defendant. The principle was adopted in *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oil* [1994] 3 CLJ 144; [1994] 3 MLJ 73 SC. See also *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia (sued as a firm) and Ors* [1996] 2 CLJ 923; [1995] 2 MLJ 185.

The affidavit supporting the application essentially repeated the grounds of the application and adds that the basis of the claim originated about ten years earlier. The 2nd defendant on behalf of all the defendants objected. It was also asserted that the averment in respect of S2-22-434-92 is misleading since the plaintiff in that case was Chua Ching Siew and the subject matter in that case has nothing to do with the subject matter in the current case.

Ronald Menon filed a further affidavit sworn on 25 August 1999 alleging that the 2nd defendant did not have authority of the other defendants, except the 8th defendant, to make swear the affidavit. He asserted he did not withdraw from conduct of the case or file a notice of discontinuance because he was obliged to use every effort to get in touch with the plaintiff who was overseas, in order to obtain instructions and documents. He also asserted that Chua Ching Siew and the plaintiff had at all times acted in concert and that there is a nexus between that case and this proceeding. It was explained that the plaintiff waited for the performance of the settlement with Chua Ching Siew by the 2nd defendant before proceeding further with this action.

Needless to say the 2nd defendant maintained his assertion of authority to make the affidavit, and questioned Ronald Menon's 'personal knowledge' that Chua Ching Siew and the plaintiff were acting in concert, which was denied.

After hearing the parties I had rejected the application. My reasons are as follows.

The proper course of action to be taken by any party aggrieved by an order is by way of an appeal. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. Striking out an action disposes off the case finally so far as the court hearing the matter is concerned. That order takes effect immediately and remains in effect unless it is set aside.

An order may be set aside ordinarily by way of an appeal. Thus where the order was made by a senior assistant registrar, the appeal is made to a judge in chambers pursuant to O. 56 r. 1 of the Rules of the High Court 1980. Appeals pursuant to O. 56 r. 2, like other appeals would be to the Court of Appeal. It is essential in my opinion to the due administration of our system of law that the appeal is dealt with by a higher authority. Once a matter has been concluded, it is no longer before that forum. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend to the making of orders in litigation that has been brought regularly to an end, be it by a hearing on the merits or having been struck off. Otherwise there can be no end to litigation. It would otherwise open the doors to ceaseless re-litigation before the same court. The value of an order of court becomes questionable if the matter can be reopened at any time and the court be at liberty to make a different order.

It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it: *In re Suffield and Watts; Ex parte Brown* [1888] 20 QBD 693; *In re Swire; Mellor v. Swire* [1885] 30 Ch D 239; *Preston Banking Co v. William Allsup & Sons* [1895] 1 Ch 141; *Ivanhoe Gold Corporation Ltd. v. Symonds* [1906] 4 CLR 642; *MacCarthy v. Agard* [1933] 2 KB 417. Once a court has made an order, it exhausts its jurisdiction, unless one can point to a specific or express provision or exception in the rules that allows that court to set aside that order. Thus, for example, a judgment in default of appearance or attendance may be set aside. An order made *ex parte* may be reviewed. But even so it is at the instance of the party who did not attend, and had not been heard.

If it is said that there is inherent jurisdiction to reinstate in the circumstances of this case I should want specific authority on the point. There is no such authority and that fact weighs very strongly against the existence of such jurisdiction. In principle, I think it is impossible to imply such a jurisdiction. In my opinion, none of the decided cases lend support to the view that a High Court has any inherent power or jurisdiction to reinstate an action that has been struck off, except by way of an appeal.

I would therefore dismiss the application on this ground.

I am aware of *Esa Sa'yon v. Woon Kim Poh & Anor* [1996] 2 CLJ 885, a case where an application for reinstatement was made after the predecessor judge has struck out an action for want of prosecution. Regrettably this question of whether the High Court has the power to reinstate or not was neither raised nor was it dealt with, and the judgment had proceeded on the assumption there is such power. The question was not essential to the decision. The learned judge dismissed the application on the facts.

Even if I am wrong in holding that there is no inherent power to reinstate after the action has been struck off, it is clearly wrong in the circumstances of this case, to exercise the discretion in favour of the plaintiff for the following reasons.

In this case, Mr Ronald Menon attended before the judge on 27 March 1999 on the show cause notice. He had opportunity to be heard. He informed the court a summons for directions and did not have any good reason for failing to do so. The affidavit in support failed to explain the brazen response made on 27 March 1999 or even to allude to it. As a result there is a clear conflict on the record. Instead the approach adopted in the application is as if the application is a matter of right, which it is not. If the grounds given in this application is true, counsel had no reason not to be able to disclose on 27 March 1999 the grounds of difficulty in contacting his client resident overseas, as well as the other reasons now given for non action. I am convinced that the answer on 27 March 1999, even if it sounded brazen, is more likely to be true that the reasons now given in the affidavit. In my opinion, the want of prosecution is not only contumelious, but the present assertions in the supporting affidavit even aggravates that contumeliousness with obviously after-thought reasons.

It is also my considered opinion that even if the predicament of the plaintiff arises from a mistake of the counsel, it would not have been reason for the exercise of the discretion to reinstate even if it exists. A lawyer's mistake is not an excuse. In *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129 FC it was held that the mistake of the appellant's solicitors did not constitute a sufficient ground for granting the extension of time. The law here in Malaysia as was pointed out by Suffian FJ (as he then was) in the case of *Chong Kueng Ying & Ors. v. Lovis Lavagna* [1972] 1 MLJ 180 is the same as the previous English Law – the mistake of a legal adviser is not a sufficient ground for granting special leave to appeal. Similarly in *Chin Hua Sawmill Co. Sdn Bhd v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 it was held that the failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.

The argument that a plaintiff's claim has merit is of peripheral interest in an application for reinstatement, which is concerned more with the question why the action was struck off in the first place. The merit argument is only applicable in the context of O. 18 r. 19 of the Rules of the High Court 1980 hearing.

The prejudice argument is equally shallow. Superficially and colloquially, a person can say an order made against him is to his prejudice. But that is not 'prejudice' with which the law is concerned. Thus while colloquially the plaintiff is 'prejudiced' if he is not able to proceed with his claim, in law there is no prejudice, for the reason there is nothing to stop the Plaintiff from pursuing his claim within the period allowed by the Limitation Act, other than by his own indolence or choice from pursuing his claim timely. The court cannot consort with any party to circumvent or sidestep the Limitation Act or any law for that matter. Similarly, the court cannot assist the plaintiff in the dubious exercise of causing Chua Ching Siew and the first defendant to proceed with the consent order by letting them believe Civil Suit D3-22-143-96 is not proceeded with and then at a very late stage reinstating Civil Suit D3-22-143-96 after it has been struck off. If the plaintiff chooses to be overseas and in this day and age of easy communication and travel not to stay in touch with his counsel, then it must be said he had willfully allowed non-prosecution of his action and for it to be struck off. Indeed the affidavit in support of this application was not even made by the plaintiff, but by his counsel.

In all of these circumstances there is absolutely no merit in the application. The application was therefore refused.